United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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P/S

76-1515

To be argued by Marshall Tamor Golding

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

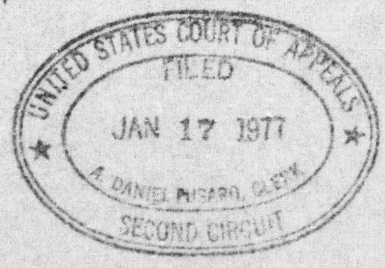
UNITED STATES OF AMERICA, APPELLEE

v.

LOUIS JAMES DESALVATORE, a/k/a
LOUIS PIZZA, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES



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ISSUE PRESENTED

Whether a ten year sentence on a guilty plea to a narcotics conspiracy charge violated due process because of the information considered by the court in imposing the sentence and statements made by the prosecutor to rebut a presentence memorandum filed by the defendant after the prosecutor had made a plea bargain agreement to take no position on sentence.

STATEMENT

Appellant was convicted on his guilty plea in the United States District Court for the Eastern District of New York of conspiring to possess and distribute narcotics, in violation of 21 U.S.C. 812, 841(a) and 841(b)(1)(A). On October 20, 1976, he was sentenced to ten years' imprisonment to be followed by a special parole term of seven years. On the same day, appellant

noted an appeal and was released on bail pending appeal.

In addition to the conspiracy count to which he pleaded guilty on June 22, 1976, the indictment charged appellant with six substantive counts of possessing and distributing narcotics. Two co-defendants -- Anthony Fago and John Giangrande -- and a deceased individual named George Adamo were also charged in the conspiracy count; Fago and Giangrande were charged in one each and Adamo in two of the substantive counts while the remaining two substantive counts charged only appellant (A. 3a-4a).[1/] The six substantive counts were dismissed against appellant after his guilty plea on motion of the government (A. 40a). Fago and Giangrande went to trial on the indictment before the sentence on appellant was imposed; Fago was convicted and Giangrande acquitted (A. 11a).

Prior to sentencing, appellant's attorney submitted a presentence memorandum (A. 32a-39a) which disputed a number of the statements in the presentence report prepared by the probation department (A. 36a-38a); portrayed appellant as a hardworking family man of limited means with no prior criminal record (A. 32a-35a); claimed that he was "not a major dealer in narcotics" and "did not have a significant role" in the events

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1/ Six overt acts were set forth in the conspiracy count. Three of them specified the distribution of narcotics by, respectively, appellant, Giangrande and Adamo; the other three specified meetings between, respectively, appellant and Fago, appellant and Giangrande, and appellant and Adamo on the day of each of the narcotics distributions (A. 5a-6a). The three narcotics distributions specified as overt acts corresponded to three of the substantive counts of the indictment; the other three substantive counts (two involving appellant alone and one involving appellant and Adamo) were not reflected in overt acts.

which were the subject of the indictment but rather, "due to constant urging" by a government informer, acted as a middle man bringing the informer and Adamo together for which he received only approximately $1000 (A. 35a-36a)[2]; and on this basis urged that probation would be the most appropriate sentence (A. 38a-39a). Addressing the court at sentencing, appellant's attorney argued that the act for which appellant pleaded guilty was "an isolated thing" and that "the sentence should reflect this particular act and this act alone and the fact that he is a first offender" (A. 19a).

The prosecutor undertook to rebut the allegations in appellant's presentence memorandum. Appellant's attorney objected, claiming that, as part of the plea bargain agreement, the prosecutor had agreed to take no position on sentence but was now asking "to be heard on sentence" (A. 18a). The prosecutor responded that, while he had said that he "would not speak as to sentence," he felt it necessary to rebut the implication in appellant's presentence memorandum "that the Government has either presented false information to the Probation Department or in some way tried to create a different record of this defendant now before the Court" (ibid.).

Permitted by the court to continue, the prosecutor called the court's attention to evidence from the trial of Fago and Giangrande which indicated that appellant owned rather than

2/ The memorandum asserted that appellant had "denied every other count in this indictment" (A. 35a).

merely managed the tavern at which he was employed and in addition owned a meat market and had previously owned a pizza restaurant (A. 19a-22a);[3] the prosecutor's purpose was to show that appellant was "not the small time wage earner that defense counsel is trying to picture him as being" (A. 22a). The prosecutor also pointed out that in sixteen tapes admitted into evidence in the aforementioned trial appellant talked to the informer about the purchase of narcotics (ibid.); that in one tape appellant told the informer that he had put up $350,000 as front money for the purchase of narcotics (A. 24a); and that, in contradiction to appellant's claim that he had received only $1,000 from his participation in the transactions which were the subject of the indictment, there was evidence that he personally received $24,000 from the informer in connection with one of the narcotic sales (ibid.). Appellant's attorney objected again that, "[c]ontrary to the spirit of the plea we took" and "after saying that he wouldn't take a position," the prosecutor was trying to show from testimony in the trial "which we were not a part of" that appellant was "a serious participant" in the narcotics transactions. The court responded that appellant's presentence memorandum had attempted to show the contrary and the prosecutor had the right "to clarify what the issues were" (A. 25a).

During the foregoing colloquy, the court stated that it was going to sentence appellant "on what he pleaded to and not

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3/ Appellant thereafter explained that the restaurant had been owned by his father rather than himself (A. 26a).

the other things," but that it was fully convinced of appellant's guilt from the evidence at the trial of his co-defendants (A. 23a). Subsequently, the court stated that the trial evidence showed that a serious offense had occurred and that appellant "was implicated and played a leading role in this situation" (A. 27a). The court went on to say that, in imposing sentence, it was taking into consideration the fact that appellant pleaded guilty, but was also taking into consideration the fact that he had twice previously been charged with narcotics offenses for which he had not been convicted; thus, the court added, while appellant might be a first offender in terms of his conviction record, the previous charges should have but did not serve as a warning to him to refrain from involvement in the narcotics trade (ibid.). Finally the court noted that appellant was involved in several narcotics transactions "involving a total of $38,400 in Government money which has never been recovered" (A. 29a). Based upon these considerations, sentence was imposed (ibid.). Appellant's attorney immediately objected that the court had considered matters which the prosecutor "convinced us he would not bring into the case" and had sentenced appellant on all the evidence in the trial which appellant had pleaded guilty in order to avoid being a participant in and hence had had no opportunity to cross-examine on (A. 30a). The court replied that the basis for the sentence was not "to any marked extent" the matters which the prosecutor brought out "to clarify any discrepencies which may have arisen concerning the presentence report," but

rather the basis was its conviction from the trial that appellant was "one of the central and principal figures" in the narcotics transactions, the seriousness of the offense, and the fact that appellant "had a prior history in drugs and he should have known better" (ibid.).

ARGUMENT

THERE WERE NO IMPROPER CONSIDERATIONS CONSTITUTIONALLY INVALIDATING APPELLANT'S SENTENCE

Appellant's contention that he was sentenced upon the basis of improper considerations is meritless. Contrary to his insinuation--made below and repeated in this court (Br. 4)--that he pleaded guilty only to one instance of acting as a go-between, he in fact pleaded guilty to a conspiracy count the overt acts of which included one narcotics sale directly by him and two other narcotics sales in which it was charged that he indirectly participated. The ten year prison sentence imposed upon him was well within the fifteen year maximum for a first conviction provided by 21 U.S.C. 841(b)(1)(A), and the seven year special parole term was fully consonant with the seriousness of the offense.

It was, in any event, perfectly proper for the court, in imposing sentence, to consider the total offense with which appellant was charged and not merely the single count to which he pleaded guilty. "The narrowing of the indictment to a single count limits the maximum punishment the court can impose but not

the scope of the court's consideration within the maximum. The dismissal of the other counts at the Government's request was not an adjudication against it on the merits * * *" United States v. Doyle, 348 F.2d 715, 721 (2d Cir., 1965), cert. den., 382 U.S. 843 (1965). The court therefore correctly considered, for purposes of sentence, the evidence produced at the trial of appellant's co-defendants which showed that appellant was "one of the central and principal figures" in the narcotics transactions. "A sentencing judge's access to information should be almost completely unfettered in order that he may 'acquire a thorough acquaintance with the character and history of the man before [him].'" United States v. Schipani, 435 F.2d 26, 27 (2d Cir., 1970), cert. den., 401 U.S. 983 (1971); see also United States v. Tucker, 404 U.S. 443, 446-447. It is of no moment that, because of his guilty plea, appellant had no opportunity to cross-examine on the trial evidence. "[M]odern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial." Williams v. New York, 337 U.S. 241, 247 (1949); see also Williams v. Oklahoma, 358 U.S. 576, 584 (1959). 4/

4/ Appellant argues that if the court "was so influenced by what happened in the other trial, it should have told [him] to take back his plea and go to trial in that matter" (Br. 11). The simple answer is that it was the duty of appellant, not the court, to initiate a withdrawal of plea, and appellant made no such effort.

Similarly, it was not improper for the court to consider the two prior narcotics charges against appellant, even though he was not tried on one and acquitted on the other. See Williams v. New York, supra, 337 U.S. at 244; United States v. Sweig, 454 F.2d 181, 184 (2d Cir., 1972); United States v. Cifarelli, 401 F.2d 512, 514 (2d Cir., 1968), cert. den., 393 U.S. 987 (1968). "To argue that the presumption of innocence is affronted by considering unproved criminal activity is as implausible as taking the double jeopardy clause to bar reference to past convictions." United States v. Doyle, supra, 348 F.2d at 721. 5/

5/ United States v. Malcolm, 432 F.2d 809 (2d Cir., 1970), upon which appellant relies (Br. 9), is inapposite. In that case, the sentencing judge was under the misapprehension that the defendant had pleaded guilty to crimes to which he in fact had not. See 432 F.2d at 816. Here the court was perfectly aware that appellant had not previously been convicted, and found significance in the prior charges only as warnings which appellant had failed to heed. United States v. Stein, 2d Cir., No. 76-1299, decided October 22, 1976, similarly involved a sentence based upon factual misapprehensions on the part of the court. A further factor in Stein was the court's reliance upon an unfavorable presentence report by the probation department without bringing a later favorable one to the defendant's attention so that he could use it to argue for leniency. In like fashion, the fatal flaws in the sentencing proceedings in United States v. Robin, 2d Cir., No. 76-1033, decided October 15, 1976, were the failure to give the defendant adequate time to examine the unfavorable probation department presentence report in order to prepare a rebuttal and the refusal of the court to consider mitigating evidence offered by the defendant at the time of sentence. Here, in contrast, appellant received the probation department report in ample time to answer it with his own counter presentence memorandum, and the court gave full consideration to all items submitted by appellant in his bid for leniency (see A. 10a).

Nor was the sentence improper because of the prosecutor's presentation to the court--a presentation which, in any event, did not "to any marked extent" play a part in the sentence imposed (see A. 30a). The prosecutor did not, as in Santobello v. New York, 404 U.S. 257 (1971), make a sentence recommendation after promising not to. Rather, he merely undertook to correct misstatements made to the court on appellant's behalf. To do so was not a violation of his agreement not to take a position on sentence. A defendant can no more use such an agreement as a license to mislead the court than he can use the suppressibility of evidence against him as a license to commit perjury during trial. Compare Harris v. New York, 401 U.S. 222 (1971); Walder v. United States, 347 U.S. 62 (1954).[6/]

At bottom, appellant thought that by pleading guilty and avoiding trial, he could hide his degree of complicity in the offense and obtain probation or a minimal sentence. He has no valid grounds for complaint because neither the court nor the prosecutor permitted him to get away with his dissembling scheme.

6/ Palermo v. Warden, 2d Cir., Nos. 76-2055, 76-2060, 76-2063, decided November 1, 1976, which appellant cites together with Santobello (Br. 12), is totally inapposite. After a hearing, the district court found that the defendants in that case were induced to plead guilty by representations that they would receive an early parole, although no assurances in that regard were obtained from the parole board; the prosecutor also agreed to take all possible steps to achieve an early parole and thereafter violated his agreement. The district court therefore concluded--and this Court agreed--"that the plea bargain was negotiated in bad faith
(Footnote cont'd.)

CONCLUSION

It is therefore respectfully submitted that the judgment and sentence imposed upon appellant be affirmed.

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6/ (Footnote cont'd.)
by the prosecutors and that it was not carried out" (slip opinion at 5950). Here, the only bad faith displayed was appellant's attempt to use the prosecutor's agreement to remain silent at sentencing as a license to mislead the court.

CERTIFICATE OF SERVICE

I certify that two copies of this brief were mailed this 12th day of January, 1977, to counsel for appellant at the following address:

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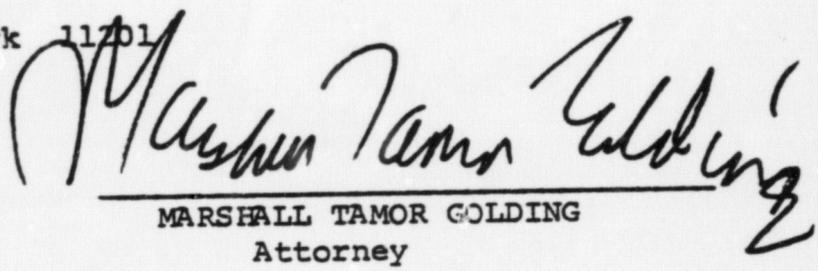

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